STATE OF MICHIGAN

COURT OF APPEALS

MASB-SEG PROPERTY/CASUALTY POOL, INC.,

Plaintiff-Appellant,

V

METALUX,

Defendant/Third Party Plaintiff-Appellee,

and

MEDLER ELECTRIC COMPANY,

Defendant-Appellee,

and

ADVANCE TRANSFORMER COMPANY,

Third Party Defendant.

UNPUBLISHED
July 1, 2003

No. 229840
Calhoun Circuit Court
LC No. 94-002763-CZ

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Plaintiff MASB-SEG Property/Casualty Pool, Inc. appeals by right the grant of summary disposition to defendants Metalux and Medler Electric Company in this products liability case. We affirm.

Plaintiff argues on appeal that the trial court, for a number of reasons, improperly excluded plaintiff's expert witnesses' testimony. We disagree. Claims of res judicata are questions of law reviewed de novo. *Wayne Co v City of Detroit*, 233 Mich App 275, 277; 590 NW2d 619 (1998). "Whether law of the case applies is a question of law subject to review de novo." *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). The admissibility of expert witness testimony is within the court's discretion and is reviewed for abuse of

discretion. *Berryman v K Mart Corp*, 193 Mich App 88, 98; 483 NW2d 642 (1992). An "abuse of discretion will be found 'only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made.'" *Id*., quoting *Gore v Rains & Block*, 189 Mich App 729, 737; 473 NW2d 813 (1991). This Court reviews the grant of summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Under the doctrine of res judicata, a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies. *Wayne Co*, *supra* at 277. It then constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action. *Id*. The doctrine of res judicata applies to a separate lawsuit and does not apply usually when the lawsuit is a continuation of the parties' original action. *Harvey v Harvey*, 237 Mich App 432, 437; 603 NW2d 302 (1999). In this case, the dispute in question had not been resolved in an earlier adjudication, as indicated by this Court's remand of the matter in an earlier appeal, nor is this case a separate lawsuit. *MASB-SEG Property/Casualty Pool, Inc v Metalux*, 231 Mich App 393, 395, 404; 586 NW2d 549 (1998). It is a continuation of the parties' original action. *Harvey*, *supra* at 437. Importantly, while this Court affirmed the trial court's earlier limitation of the scope of the expert witnesses' testimony, we did not specifically mandate the trial court to *allow* the expert witnesses to testify, or hold that the expert witnesses conducted adequate testing. See *VanderWall v Midkiff*, 186 Mich App 191, 202; 463 NW2d 219 (1990). Moreover, defendant did not challenge the trial court's decision during the first trial, but did raise the issue of the expert witnesses' inadequate testing as it related to the second trial. *Harvey*, *supra* at 237. Therefore, the trial court's decision that plaintiff's expert witnesses inadequately tested and, therefore, were not qualified to testify did not violate the doctrine of res judicata.

Under the law of the case doctrine, a decision by this Court binds the trial court on remand. *Sumner v General Motors Corp (On Remand)*, 245 Mich App 653, 661; 633 NW2d 1 (2001). The "trial court 'may not take any action on remand that is inconsistent with the judgment of the appellate court.'" *Id*. at 662, quoting *Kalamazoo v Dep't of Corrections (After Remand)*, 229 Mich App 132, 135; 580 NW2d 475 (1998). "The doctrine applies only to those questions determined by an appellate court's prior decision and necessary to it." *United States Fidelity & Guaranty Co v Liberty Mutual Ins Co*, 127 Mich App 365, 371; 339 NW2d 185 (1983).

The law of the case doctrine did not preclude defendants from later objecting to the expert witnesses' qualifications. As this Court stated in *People v Goliday*, 153 Mich App 29, 33; 394 NW2d 476 (1986), "The doctrine of law of the case is inapplicable where different questions of law are presented in the first and second appeals." At issue in the first appeal was whether plaintiff presented a reasonable probability that the defect was attributable to defendants, as well as plaintiff's failure to preserve the evidence. *MASB-SEG*, *supra* at 398, 400. However, this Court did not decide the issue of the experts' testing, nor was it one necessary to determine the question presented. See *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000).

Further, while plaintiff argues that judicial economy requires that defendants should have raised evidentiary objections at the first trial, "[j]udicial economy does not overwhelm all other concerns." *Sumner*, *supra* at 666. "The goal of securing a just determination does not always coincide with the goal of securing a speedy determination." *Id*. The trial court's decision did not violate the interests of judicial economy.

Finally, MRE 702 states:

> If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Testimony that is purely speculative should be excluded pursuant to MRE 403. *Phillips v Deihm*, 213 Mich App 389, 402; 541 NW2d 566 (1995). Importantly, "[t]he facts and data on which an expert relies in formulating an opinion must be reliable." *Anton v State Farm Mutual Automobile Ins Co*, 238 Mich App 673, 677; 607 NW2d 123 (1999).

While the scientific testimony need not be known to a certainty, "the basic methodology and principles employed by an expert to reach a conclusion [must be] sound and create a trustworthy foundation for the conclusion reached . . . ." *Nelson v American Sterilizer Co (On Remand)*, 223 Mich App 485, 491-492; 566 NW2d 671 (1997). Because the trial court must ensure that all expert witness testimony is relevant *and* reliable, *id*. at 489, the trial court did not abuse its discretion when it determined that the expert witnesses' inadequate investigations precluded their ability to provide relevant and reliable testimony. One witness testified he took more photographs of the scene, but he did not know where the film was. He also did not know what light fixture was removed from the building, and he was mainly concerned with only one competent source of ignition and did not consider others. Another witness stated he could not determine if a particular fixture or capacitor caused the fire because he did not have enough information. He also explained that if the lights were not on, the fixture defendants manufactured and sold could not have caused the fire, yet he did not know whether the lights were on and did not ask. Finally, the third witness also admitted it was crucial to know if the lights were on, but he did not examine or photograph the light switch to so determine. Consequently, the trial court's disqualification of the expert witnesses based on their inadequate testing and unreliable methods was not an abuse of discretion. See *Anton*, *supra* at 677.

We affirm.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder